**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Mutifamily Broadband Council	)))	MB Docket No. 17-91

COMMENTS OF THE FIBER BROADBAND ASSOCIATION

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I. INTRODUCTION AND SUMMARY

The Fiber Broadband Association (FBA)[1] urges the Commission to deny the Petition for Preemption (Petition) filed by the Multifamily Broadband Council (MBC), most fundamentally because the Commission has consistently refrained from intervening in states and localities' relationships with property owners as reflected in mandatory access laws.[2] MBC's request for preemption of Article 52 of the Police Code of San Francisco (Article 52 or the Ordinance) asks the Commission to overturn its prior decisions about the scope of federal authority over landlord-tenant relationships and reverse its deference to state and local regulation of property owners in facilitating access to competitive service offerings through mandatory access laws. For the reasons discussed herein, MBC's arguments fail.

Article 52, entitled "Occupant's Right to Choose a Communications Service Provider," is a mandatory access law that promotes multichannel video and broadband competition in

[1] The FBA, formerly the Fiber to the Home Council, is a not-for-profit trade association that provides advocacy, education, and resources to service providers, equipment vendors, organizations, and communities about the value and deployment of all-fiber networks. The FBA's mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. FBA's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content provider companies, as well as traditional service providers, utilities, and municipalities. The FBA has approximately 250 members, which are listed at: http://www.fiberbroadband.org/OurMembers.

[2] Petition for Preemption, Multifamily Broadband Council, MB Docket No. 17-91 (filed Feb. 24, 2017) (Petition).

multiple dwelling unit buildings (MDUs) in San Francisco.[3] Article 52 furthers tenants' choice among a diversity of service providers, thereby benefitting San Francisco residents. The Ordinance is grounded in San Francisco's unquestionable authority to regulate property owners and landlord-tenant relationships within its jurisdiction and is modeled on numerous other state and local mandatory access laws, some of which have been in place for decades.[4] Overall, by adopting Article 52, San Francisco complements regulatory measures the Commission imposed on telecommunications carriers and video providers, and furthers the Commission's goals of promoting competition and consumer choice, without imposing any undue burden on property owners.

Indeed, Article 52 improves upon older mandatory access laws in three key respects. First, unlike older mandatory access laws that apply solely to franchised cable operators, Article 52 reflects today's diversity of multi-channel video and broadband providers and makes it easier for all "communications services provider[s]" (*e.g.*, telephone companies, cable operators, wireless Internet service providers, independent Internet and video service providers, and fiber broadband providers) to compete for customers in MDUs.[5] Second, the Ordinance requires property owners (but not cable operators or telecommunications and other service providers) to make existing wiring infrastructure they own available for use by competitive entrants, which avoids the disruption a tenant or landlord would suffer when a new entrant installs duplicative wiring.[6] Third, the Ordinance provides landlords with numerous protections absent from most other mandatory access laws, including a multi-step inspection, design, and build process[7] and the ability to deny access for reasons of limited space, safety, and interference with incumbent

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[3] *See* Article 52 of the S.F. Police Code, Ordinance No. 250-16.

[4] *See, e.g.*, Conn. Gen. Stat. § 16-333a (1975).

[5] *See* Article 52 § 5200 (defining "Communications services provider").

[6] *Id*. at § 5201(b).

[7] *See id.* at § 5204.

service providers and other essential services.[8] These procedures ensure that usage of the property owner's wiring infrastructure is limited to instances where an existing service will not be degraded.

As discussed in detail below, the Commission should reject MBC's arguments that Article 52 is or should be preempted. Foremost, the Commission left it to states and localities to regulate the landlord-tenant relationships in their jurisdictions to enhance competition, including through the adoption of mandatory access laws.[9]

In addition, the grounds for preemption are not present. Rather than contravening federal wiring rules and creating a "conflict" under preemption jurisprudence, as MBC incorrectly asserts, Article 52 advances their purpose by providing for competitive access to existing wiring infrastructure. Article 52 also specifically addresses anti-competitive exclusive wiring arrangements that violate—or at the very least undermine the goals of—the FCC's inside wiring rules.

MBC's argument that, under the doctrine of field preemption, local governments categorically may not address use of inside wiring in legislation such as Article 52 also warrants denial. The Ordinance does *not require* mandatory sharing of wires, nor has the FCC established a rule that *restricts* a state or locality from allowing sharing of wires. Further, Article 52, by addressing only cable inside wiring and not telephone inside wiring, does not inject uncertainty into the Commission's separate frameworks for inside wiring. Instead, the Ordinance respects the Commission's separate frameworks for cable and telecommunications wiring. Article 52, by focusing on property owner wiring, also does not conflict with (or even

[8] *See id*. at §§ 5204(c)(4)(A), 5206.

[9] *See Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3698-99, para. 79 (1997) (1997 Wiring Order); *see also Telecomms. Servs. Inside Wiring, et al.*, CS Docket No. 95-184 *et al.*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1358, para. 39 (2003) (2003 Wiring Order).

implicate) the federal policy on unbundling portions of incumbent local telecommunications networks.

Finally, MBC confuses the permitted practice of bulk billing with service-provider exclusivity, the latter of which is forbidden by federal law. Bulk billing arrangements are not prohibited or restricted by Article 52, and therefore no conflict exists with the Commission's decision to allow such arrangements. Put simply, enabling competition from other providers in an MDU does not prevent bulk billing by the landlord.

The Commission should see MBC's arguments for what they are: an attempt to prevent consumers from having a choice of providers by using the Commission's inside wiring rules as a shield. MBC's underlying policy arguments are that Article 52 is bad for consumers – even though consumers want it and will benefit from it – bad for competition – even though MBC's vision runs counter to the Commission's understanding of the benefits of competition *within* MDUs[10] – and good for large providers – even though new entrants support the law and benefit the most from it. The record, let alone logic, does not support MBC's arguments, and they should be rejected.

II. THE EVOLUTION OF STATE AND LOCAL MANDATORY ACCESS LAWS

Mandatory access statutes such as Article 52 are a well-established feature of the communications landscape. States and local governments began to enact mandatory access statutes in the 1970s, with increasing adoption in the late 1980s/early 1990s, when cable operators built out their networks to provide a new source of multi-channel video

[10] *See Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Devs.*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20245, para. 17 (2007) (Exclusivity Order) (observing that even though a cable operator may face competition in an area "surrounding or adjacent to a MDU [that] does not mean that the residents of a MDU served by the same cable operator will reap the benefits of such competition, including the option to choose among competitive providers . . . .").

programming.[11] These statutes were intended to ensure that a property owner would not bar franchised cable providers from access to MDUs, including when a property owner had entered into an exclusive service arrangement with another provider.[12] The statutes allowed for video competition and consumer choice where MDU residents would otherwise be forced to take video services from a service provider of the property owner's choosing. In essence, these laws served as "consumer protection laws at a time before franchised cable operators faced competition from alternative video service providers."[13]

MBC and other incumbent interests opposed these mandatory access statutes.[14] Nevertheless, eighteen states, the District of Columbia, and numerous municipalities have mandatory access statutes on the books, and cable operators have used the laws to extend their services to new customers.[15] Courts have generally upheld mandatory access laws,[16]

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[11] *See* 2003 Wiring Order, 18 FCC Rcd at 1356, para. 35, n.82 (indicating dates of passage for state mandatory access laws).

[12] *See* 1997 Wiring Order, 13 FCC Rcd at 3744, para. 182; *see also AMSAT Cable v. Cablevision Ltd. P'ship*, 6 F.3d 867, 869 (2d Cir. 1993) (affirming a district court ruling that held that the Connecticut mandatory access statute was constitutional after a franchised cable company threatened to use the law to gain access to a building party to an exclusive service agreement with a satellite service provider).

[13] *See* 1997 Wiring Order, 13 FCC Rcd at 3744, para. 182.

[14] Comments of Independent Telecommunications & Cable Association, CS Docket 95-184, at 45 (filed Mar. 18, 1996) (stating in opposition to mandatory access laws that "most service providers require exclusivity in order to guarantee a return on investment") (1996 MCB f/k/a ITCA Comments). MBC is the legacy organization of the Independent Multi-Family Communications Council and the Independent Telecommunications & Cable Association. *See* MBC, *About Us, History*, available at http://www.mfbroadband.org/about/history (last visited May 15, 2017).

[15] *See* Connecticut (Conn Gen. Stat. § 16-333a (2016)), Delaware (26 Del. C. § 613) (1983) (only if utility easements also exists)), District of Columbia (D.C. Code § 43-1844.1) (1981)), Florida (Fla. Stat. § 718.1232) (1982) (condos only)), Illinois (55 Ill. Comp. Stat. Ann. 5/5-1096) (1993)), Iowa (Iowa Code § 477/1) (1977)), Kansas (K.S.A. § 58-2553) (1983)), Maine (14 M.R.S.A. § 6041) (1987)), Massachusetts (Mass. Ann. Laws. Ch. 166A, § 22 (LexisNexis, 2017)), Minnesota (Minn. Stat. § 238.23) (1983)), Nevada (Nev. Rev. Stat. Ann. § 711.255) (1987)), New Jersey (N.J. Stat. § 48:5A-49) (1982)), New York (N.Y. Pub. Serv. Law § 228) (1995)), Ohio (ORC Ann 4931.04) (1998)); Pennsylvania (68 P.S. § 250.503-B) (1993)), Rhode Island (R. I. Gen. Laws, § 39-19-10) (1993)), Virginia (Va. Code Ann. § 55.248, 13:2) (1997)), West Virginia (W. Va. Code § 5-18A-1) (1995)), and Wisconsin (Wis. Stat. § 66.0421) (2001)).

[16] *See, e.g.*, *NYT Cable TV v. Homestead at Mansfield*, 543 A.2d 10 (1988) (N.J.) (*per curiam*) (upholding constitutionality of mandatory access provision of New Jersey statute and finding that, as a matter of legislative intent, the provision required the payment of just compensation); *Princeton Cablevision, Inc. v. Union Valley Corp.*, 478 A.2d 1234 (N.J. Super. Ct. 1983); *Direct Satellite Commc'ns, Inc. v. Bd. of Pub. Utils.*, 615 F. Supp 1558 (D.N.J. 1985) (based on the New Jersey statute, also rejecting First Amendment

except where the laws offered no compensation to the property owner (a shortcoming Article 52 does not have).[17] The Commission also has accepted such laws on at least two occasions, declining to preempt or otherwise interfere with them.[18]

Mandatory access laws are derived from state and local authority over property owners and generally share several common elements. Most prohibit property owners from interfering with a resident's right to choose among cable services, rather than granting operators a direct right to install facilities at the property.[19] Many explicitly provide for "reasonable" or "just" compensation to the property owner for the provider's access[20] and establish reasonable restrictions on how a provider can access the property.[21] Most provide an indemnity to the landlord for damages caused by installation and provision of service.[22] Article 52 contains all of these standard protections.[23]

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claims of apartment owner to restrict access); *Times Mirror Cable Television, Inc. v. First Nat'l Bank*, 582 N.E.2d 216 (Ill. App. Ct. 1991).

[17] *See, e.g.*, *Beattie v. Shelter Props., IV,* 457 So.2d 1110 (Fla. Dist. Ct. App. 1984) (affirming a lower court ruling that a Florida mandatory access law amounted to an unconstitutional taking because it offered no just compensation to the property owner).

[18] *See* 1997 Wiring Order, 13 FCC Rcd at 3748, para. 190; *see also* 2003 Wiring Order, 18 FCC Rcd at 1344, para. 2.

[19] *See, e.g*., N.Y. Pub. Serv. Law § 228 (Consol., 2017).

[20] *See, e.g.*, 55 Ill. Comp. Stat. Ann. 5/5-1096 (LexisNexis, 2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); R.I. Gen. Laws, § 39-19-10(6) (2016).

[21] For example, the Ordinance shares nearly identical language to New York's mandatory access law stating that a provider with access to the property will "conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants." Article 52 § 5207. *See* N.Y. Pub. Serv. Law § 228 (1)(a)(1) (Consol., 2017) (requiring "the installation of cable television facilities [to] conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants"); *see also* Wis. Stat. § 66.0421(3) (2017) (requiring a "video service provider [to] install facilities to provide video service in a safe and orderly manner and in a manner designed to minimize adverse effects to the aesthetics of the multiunit dwelling or condominium").

[22] *See, e.g.*, Conn. Genn. Stat. § 16-333a (2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); W. Va. Code § 5-18A-1 (1995); Nev. Rev. Stat. Ann. § 711.255 (1987).

[23] Article 52 §§ 5201(a), 5205(b)(1)(C), 5205(b)(1)(E), 5208.

Starting in the late 1990s, as competition grew from telecommunications providers and other competitive multi-channel video entrants, the FCC examined whether mandatory access laws were in some cases skewing the competitive landscape in favor of franchised cable operators and against new, alternative video providers.[24] In its 2003 Wiring Order, the Commission similarly inquired whether mandatory access laws "tend to preclude alternative (non-cable) MVPDs [multichannel video programming distributors] from executing MDU contracts."[25] Rather than assert jurisdiction or preempt such laws, however, the FCC invited states and localities to revise the laws to encourage competition and benefit consumers in light of their own local conditions. It stated:

> States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws . . . . Therefore, we urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers.[26]

The Commission intentionally left room for states and localities to decide for themselves how best to regulate property owners to foster competition in the MDU marketplace—whether through regulation of the landlord-tenant relationship, including through mandatory access laws or otherwise—and even went so far as to encourage states and localities to enact legislative reforms to achieve those competitive ends.[27] In passing Article 52, San Francisco took the Commission's advice to heart.

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[24] *See* 1997 Wiring Order, 13 FCC Rcd at 3748, para. 190.

[25] 2003 Wiring Order, 18 FCC Rcd at 1357, para. 38.

[26] *Id.* at 1358, para. 39.

[27] *Id.*

III. ARTICLE 52 REPRESENTS A NEW MANDATORY ACCESS APPROACH

Before the passage of Article 52, San Francisco experienced the same problems that animated passage of mandatory access laws in other jurisdictions. Residents of the City's MDUs were denied a choice of service provider, often due to barriers to entry erected by incumbent providers,[28] such as wiring arrangements that contractually gave a service provider an exclusive right to use a property owner's wiring, even after a subscriber terminated the incumbent provider's service.[29] Article 52's sponsor, San Francisco Supervisor Mark Farrell, stated that "thousands of residents and businesses in multi-unit residential and commercial buildings are not given a choice" of Internet provider and there is "no reason tenants should be limited in their choice."[30] According to Farrell, local Internet service providers estimated that approximately 500 MDUs in the City, "representing more than 50,000 units have limitations in place that effectively deny them the opportunity to provide competitive Internet access."[31] Barring competition had social as well as economic costs for the community. As Farrell elaborated in support of Article 52:

> It's hard to imagine today in the internet capital of the world . . . 15% of the school children lack internet service at home. I believe we need to get everyone online and providing more choices and competition for tenants is one of the big keys to closing the digital divide and key to providing affordable high quality internet options . . . .[32]

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[28] *See* Press Release, Office of Supervisor Mark Farrell, Supervisor Farrell to Introduce First-Ever Law Guaranteeing Internet Access in Multi-Unit Buildings (Oct. 19, 2016), available at https://medium.com/@MarkFarrellSF/supervisor-farrell-to-introduce-first-ever-law-guaranteeing-internet-access-in-multi-unit-buildings-6a47aeb32db8 (last visited May 15, 2016) (2016 Farrell Press Release).

[29] The Commission has never blessed nor invalidated exclusive wiring arrangements. *See* Exclusivity Order, 22 FCC Rcd at 20236, para. 1, n.2.

[30] 2016 Farrell Press Release.

[31] *Id.*

[32] Transcript, City and Cnty. of S.F. Budget and Fin. Comm. (Nov. 20, 2016), available at http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=7&clip_id=26664 (last visited May 15, 2017).

As is obvious from these statements, the City was aware that a group of video and broadband providers—beyond just franchised cable providers—now sought access to MDUs. The City updated its mandatory access laws to address this consideration and, by doing so, also addressed the Commission's question of whether some early mandatory access laws tilted the competitive balance. Specifically, in contrast to older mandatory access laws, Article 52 benefits video and telecommunications providers offering an array of services, as long as those providers are qualified to use public rights of way.[33]

The barriers to entry that the City sought to address are manifest in Article 52's language. Specifically, the Ordinance states that any property owner that "has an agreement with a communication services provider that purports to grant the communications services provider *exclusive access* to a multiple occupancy building and/or *the existing wiring to provide services* is not exempt from the requirements of this Article."[34] The City had clearly identified exclusive wiring arrangements as an anti-competitive practice that needed to be addressed to improve competition within in the City.

At the November 30, 2016, San Francisco Board of Supervisors' Budget and Finance Committee hearing on the Ordinance, tenants' rights groups, CALTEL (an industry advocacy organization representing competitive voice, data, and video providers in California), the CEOs of Sonic Telecom and Webpass[35] (two non-incumbent Internet providers in San Francisco),

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[33] Article 52 § 5200 ("'Communications Service Provider' means a person that: (a) has obtained a franchise to provide video service from the California Public Utilities Commission under California Public Utilities Code § 5840; (b) has obtained a certificate of public convenience and necessity from the California Public Utilities Commission under California Public Utilities Code § 1001 to provide telecommunications services; or (c) is a telephone corporation as that term is defined in California Public Utilities Code § 234. In addition, a communications services provider must have obtained a Utility Conditions Permit from the City under Administrative Code Section 11.9.").

[34] *Id.* at § 5203 (emphasis added).

[35] Google Fiber entered into an agreement to acquire Webpass in June 2016 and closed the transaction in October 2016. Press Release, Google Fiber, Welcome, Webpass to the Google Fiber Family! (Oct. 3, 2016), available at https://fiber.googleblog.com/2016/10/welcome-webpass-to-google-fiber-family.html (last visited May 15, 2017).

Media Alliance (a Bay Area nonprofit focusing on media and communications democratization), and the Electronic Frontiers Foundation (a San Francisco nonprofit that promotes civil liberties and technology), among others, spoke up in favor of passage.[36] The San Francisco Board of Supervisors unanimously adopted Article 52 on December 13, 2016, and the law went into effect on January 21, 2017.

Article 52 addresses use of the property owner's inside wiring and wiring access exclusivity, while providing the property owner with protections beyond those of typical mandatory access laws. Applicability of the Ordinance, as with numerous other mandatory access laws, is triggered by an MDU occupant's request for service from a communications service provider not present in the MDU.[37] Upon receiving the occupant's request for service, the communications service provider may make a request in writing to the property owner to inspect the property to determine the "feasibility of providing services."[38] In its request, the provider must give the property owner the proposed date and time of the inspection, a copy of the Ordinance (with reference to Section 5206 that covers "Permitted Refusal of Access"), and a description of the communications services to be provided, as well as the facilities and equipment the provider intends to install in the building, the square footage, and electrical

[36] *See* Meeting Minutes, Board of Supervisors City and Cnty. of S.F. Regular Meeting, at 1044-45 (Dec. 13, 2016), available at http://sfbos.org/sites/default/files/bag121316_minutes.pdf (last visited May 15, 2017).

[37] *See* Article 52 § 5204(c)(1)(B); *see also id.* at § 5200 (defining "[R]equest for service" as an "expression of interest from an occupant received by a communications service provider either by mail, telephone or electronic mail. A contact between an occupant and a communications services provider through a sign-up list contained on the provider's website [is] deemed a request for service once the communications services provider confirms the request either by telephone or electronic mail"). Although MBC implies that the term "occupant" is overly broad, San Francisco routinely uses the term in its code. *See, e.g.*, S.F. Housing Code (2016), available at http://library.amlegal.com/nxt/gateway.dll/California/sfbuilding/sanfranciscobuildinginspectioncommission?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_BICCodes (last visited May 15, 2017).

[38] *See* Article 52 § 5204(a)-(b). Although timelines between resident requests for service and provision of service differ among mandatory access statutes, an intermediate inspection step prior to installation and its associated requirements are unique to Article 52.

supply required.[39] Upon receipt of this request, the property owner may authorize inspection by the provider on reasonable conditions, or deny the provider the right to provide services at the property for any of the following reasons enumerated under Section 5206 of the Ordinance:

> (1) The communications services provider is not authorized to provide communications services in the City;
>
> (2) The communications services provider cannot verify that one or more occupants of the multiple occupancy building have made a request for services;
>
> (3) The property owner can show that physical limitations at the property prohibit the communications services provider from installing the facilities and equipment in existing space that are necessary to provide communications services and/or from using existing wiring to provide such services;
>
> (4) The communications services provider has not agreed to the property owner's request that the provider comply with any conditions on accessing the property contained in a notice from the property owner issued pursuant to Section 5207 of this Article 52; or
>
> (5) The communications services provider's proposed installation of facilities and equipment in or on the property would: (A) have a significant, adverse effect on any historically or architecturally significant elements of the property; (B) disturb any existing asbestos or lead-paint in or on the property; (C) have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property; (D) cause undue damage to the property; or (E) impair the use of the property for the continued provision of any existing essential services; or
>
> (6) The property owner and communications services provider have not reached an agreement concerning any just and reasonable compensation to the property owner for allowing the communications services provider to install, operate, and maintain facilities and equipment on its property as required by Section 5208 of this Article 52.[40]

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[39] *See id.* at § 5204(c)(2)-(3), (5).

[40] *See id.* at § 5206(b).

The provider must further agree to "indemnify, defend, and hold harmless the property owner for any damage caused by the inspection."[41]

If the provider wishes to proceed with service following an inspection of the property, it must send a written notice of intent to provide service to the property owner prior to installing facilities.[42] This notice must include the unit numbers of occupants requesting service, the proposed amount of "just compensation" to be paid to the property owner for access, "a full set of the communications services provider's detailed plans and specifications for any work to be performed and facilities and equipment to be installed in or on the property, including any required utility connections and the electrical demand of any facilities and equipment to be installed,"[43] and the proposed start and end installation dates, which must commence at least 30 days in the future.[44]

Upon receipt of this notice, the property owner may deny access based on any of the grounds listed in Section 5206, authorize installation and accept the proposed just compensation amount, or authorize installation and counteroffer the proposed just compensation amount (which must be agreed upon by the parties prior to any installation of a provider's facilities).[45] The provider must again agree to "indemnify, defend, and hold harmless the property owner for any damage" it causes,[46] and the property owner may additionally require the provider to conform to reasonable conditions on access, demonstrate that its installers are qualified, show that it obtained required permits, provide a certificate of insurance, allow for inspection of its facilities by the property owner, cover costs of power usage, and agree to

[41] *Id.* at § 5204(c)(1)(D).

[42] *Id.* at § 5205(a).

[43] *See id.* at § 5205(b)(1)-(3).

[44] *Id.* at § 5205(a).

[45] *Id.* at § 5205(b)(4).

[46] *Id.* at § 5205(b)(1)(E).

remove its facilities upon discontinuance of service.[47] Only after successful conclusion of these steps may a provider install facilities and make its services available.

IV. ARTICLE 52 IS CONSISTENT WITH FEDERAL LAW AND NOT SUBJECT TO PREEMPTION

The Commission has never asserted jurisdiction over property owners in the area of access by service providers and left states and localities with ample room to regulate access to private property through passage of mandatory access laws like Article 52.[48] Further, Article 52 does not conflict with any federal law addressing competitive access to wiring inside MDUs, bulk billing, or "unbundling."[49] For these reasons, Article 52 is not subject to federal preemption.

Conflict preemption invalidates a state or local law to the extent such a law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[50] Article 52 promotes the purposes and objectives of the Commission's inside wiring rules and fulfills the Commission's congressionally-mandated goals of promoting competition and consumer choice by allowing for competitive access to MDUs and the landlord's existing wiring. In addition, Article 52 relies on—rather than conflicts with—the Commission's existing rules governing telephone and cable inside wiring in how it addresses the landlord's cable inside wiring.

Finally, Article 52 is not—as MBC argues—subject to field preemption with regard to its "imposition of mandatory wire sharing."[51] Field preemption applies when the "federal interest is

[47] *Id.* at § 5207(b).

[48] Instead, the Commission asserted jurisdiction over communications providers in a manner that may have an indirect and incidental impact on property owners. The Commission's decisions regulating inside wiring of providers and barring providers from entering into or enforcing exclusive arrangements with property owners in MDUs and multi-tenant environments are examples of this category of Commission action. *See generally* Exclusivity Order.

[49] *See generally* Petition.

[50] *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (*Hillsborough*).

[51] Petition at 29.

so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[52] However, contrary to MBC's assertion, Article 52 does not impose mandatory wire sharing, nor is there a federal rule prohibiting sharing of wires that occupies the field.

A. The Commission Defers to States and Localities in Regulating Property Owners and the Landlord-Tenant Relationship

The Commission's consistent statements and rulings declining to assert jurisdiction over property owners on issues of access leave ample room for states and localities in their own jurisdictions to decide how best to strike the proper balance between a tenant's consumer protection rights and a landlord's property rights to encourage competition and consumer choice. Mandatory access laws, such as Article 52, represent the balance that at least nineteen different jurisdictions have struck in regulating the landlord-tenant relationship.[53] These mandatory access laws, premised on the states and municipalities' jurisdiction over property owners and the landlord-tenant relationship, complement the Commission's actions taken regarding inside wiring and exclusive access arrangements premised on jurisdiction over communications providers. The Commission has never preempted these laws and definitively left room for states and localities to adopt, interpret, and enforce them.

In its 1997 Wiring Order, the Commission refused to preempt state mandatory access laws or establish a federal mandatory access law.[54] Rather, federal wiring rules would not preclude state mandatory access laws,[55] and state courts would decide the "enforceability of a

[52] *See Hillsborough*, 471 U.S. at 713.

[53] *See supra* note 15.

[54] 1997 Wiring Order, 13 FCC Rcd at 3742-43, 3748, paras. 178, 189.

[55] MBC even admits that the Commission intended to preserve state law in adopting and applying its wiring rules. *See* Petition at 31, n.106.

state mandatory access statute" under state law.[56] Accordingly, the Commission left it to states and localities to decide the need for, scope, and enforceability of mandatory access laws. In refusing to preempt state mandatory access laws again in its 2003 Wiring Order, the Commission also encouraged states to reform and find innovative ways to promote competition in their own jurisdictions.[57]

Here, San Francisco identified a lack of consumer choice in MDUs and unmet consumer demand for communications services. As expressly recommended by the Commission, the City addressed these concerns by enacting Article 52 to enable service by a diverse group of broadband providers and new entrants. The City also identified underutilized MDU wiring infrastructure and the practice of exclusive wiring arrangements as barriers to entry that prevent MDU residents in San Francisco from benefiting from competition and choice. Article 52 addressed these concerns by preventing a property owner from blocking competitive usage of wiring it owns. Article 52 therefore addressed the issues the Commission identified about the potential for mandatory access laws to tilt the competitive balance away from competitive providers and lowered barriers to entry that reduced competition and consumer choice in San Francisco.

B. Article 52 Does Not Conflict with the Commission's Rules on Competitive Access to Wiring Inside MDUs

MBC argues that, by supposedly requiring landlords to make their wiring available to "any and all competitors," Article 52 prevents property owners from "bargain[ing] for the optimal

[56] *See* 1997 Wiring Order, 13 FCC Rcd at 3698, para. 79 (considering whether existing state mandatory access laws afforded a sufficient legally enforceable right for incumbent operators to maintain their home run wiring against the wishes of the property owner after application of the federal inside wiring rules); *see also* 47 C.F.R. § 76.804(a) ("Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a minimum of 90 days' written notice that its access to the entire building will be terminated . . . ").

[57] *See* 2003 Wiring Order, 18 FCC Rcd at 1358, para. 39.

mix of communications services on behalf of [their] tenants" and specifically discourages service by "provider[s] reliant on traditional financing tools."[58] Presumably, MBC means that introducing a competing service within an MDU will negatively impact the revenues that its operator members get from being the sole provider in San Francisco MDUs.

In support of this argument, MBC relies on the Commission's 1997 Wiring Order, which requires an incumbent provider to remove, abandon, or sell its home run wiring[59] to the property owner whenever a resident chooses an alternative service.[60] MBC argues that the 1997 Wiring Order meant to "empower" property owners, but distorts the underlying reasons for the Commission's wiring rules.[61] MBC also asserts that Article 52 creates confusion by not specifically addressing the use of telecommunications inside wiring, which is governed by a separate regulatory regime than cable inside wiring.[62] Property owners, MBC continues, may end up treating all wiring as "existing wiring" under Article 52, contrary to federal policy.[63] As

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[58] Petition at 18-19.

[59] Cable home wiring is the "internal wiring contained within the premises of a subscriber which begins at the demarcation point," which is the point located about "twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. §§ 76.5(ll), (mm)(2). Home run wiring is the "wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop." *Id.* at § 76.800(d). The rules on cable home and home run wiring differ in that, with respect to the incumbent provider's obligation to "sell, remove or abandon" its wiring, the disposition of title to the wiring runs initially to the benefit of the individual subscriber (then the landlord or competitive service provider) in the case of cable home wiring, and runs initially to the benefit of the property owner (then the competitive service provider) in the case of home run wiring. *See id.* at §§ 76.802, 76.804.

[60] The rules also provide for disposition of an incumbent's home run wiring when the service is terminated for an entire building. *See id.* at § 76.802.

[61] Petition at 18-19. In addition, while much of the discussion here focuses on the Commission's rules pertaining to home run wiring, it should be noted that MBC's contention that the Commission's rules favor "property owner control over inside wiring" are contradicted by the applicable cable home wiring rules, which by their very application favors *subscriber* control over inside wiring. *See* 47 C.F.R. § 76.802(a)(2). As discussed below, exclusive wiring arrangements fly in the face of the Commission's policies underpinning the home wiring rules.

[62] Petition at 20.

[63] *Id.* at 20-21.

further explained below, MBC grossly mischaracterizes both the Commission's rules and Article 52.

i. Like Article 52, the Inside Wiring Rules are Intended to Promote Consumer Choice and Competition

MBC's theory that the Commission's wiring rules were meant to empower property owners fails on its own terms. While the 1997 Wiring Order did spell out conditions under which property owners would assume ownership and control over inside cable wiring, nothing in either the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act)[64] or the Commission's cable inside wiring rules promulgated pursuant to the 1992 Cable Act supports the idea that property owner control or landlord empowerment were the primary policy goals underlying the regulatory regime. To the contrary, the goals of the 1992 Cable Act were to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" and to "promote competition in cable communications."[65] In furtherance of these goals,[66] under Section 16(d) of the 1992 Cable Act (codified at Section 624(i) of the Communications Act), Congress instructed the Commission to create cable inside wiring rules to "protect customers from unnecessary disruption and expense caused by the removal of home wiring and to allow subscribers to use the wiring for alternative multichannel video programming delivery systems."[67] Consistent with that instruction, the Commission adopted both cable home and home run wiring rules ultimately designed to facilitate competitive access to existing wiring upon a subscriber's termination of

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[64] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act).

[65] 47 U.S.C. § 521(4), (6).

[66] *See* 1997 Wiring Order, 13 FCC Rcd at 3678-79, para. 36.

[67] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket 92-260, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561, 4565-66, para. 8 (1996).

service and allow subscribers and property owners alike to avoid the disruption of having existing wiring removed or multiple sets of wires installed.[68] Indeed, in the 1997 Wiring Order upon which MBC relies, the Commission stated its rationale for adopting the home run wiring rules:

> Property owners' resistance to the installation of multiple sets of home run wiring in their buildings may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes of the Communications Act, and particularly Section 624(i), which was intended to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service.[69]

In its subsequent 2003 Wiring Order, the Commission reaffirmed the rationale for its inside wiring rules. The Commission asserted that the home run wiring rules "serve the statutory goals" of the 1992 Cable Act "by facilitating competitive entry by providers offering diverse information sources and services."[70] Moreover, the Commission specified that "by permitting subscribers to use their existing home wiring to receive an alternative video programming service," the home run wiring rules "promote Section 624(i)'s underlying purpose of promoting consumer choice."[71] In allowing access to competitive providers upon a resident's request for service (subject to terms of the Ordinance), Article 52 enhances and promotes the

[68] *See* 2003 Wiring Order, 18 FCC Rcd at 1346-47, paras. 8-9; *see also* 1997 Wiring Order, 13 FCC Rcd at 3667, 3678, paras. 10, 35 (discussing the disruption avoided by adoption of the cable home and home run wiring rules).

[69] 1997 Wiring Order, 13 FCC Rcd at 3678, para. 36.

[70] 2003 Wiring Order, 18 FCC Rcd at 1346, para. 7.

[71] *Id.* at 1346, paras. 7-8. Further, had the wiring rules been instituted to further a policy preference of property owner control over inside wiring, the Commission would have required service providers to "transfer to the MDU owner upon installation ownership of the home wiring and home run wiring installed in MDUs under contracts entered," which the Commission specifically declined to do. *See* 1997 Wiring Order, 13 FCC Rcd at 3691, para. 62.

Commission's goal of consumer choice by "foster[ing] the ability of subscribers who live in MDUs to choose among competing service providers."[72]

MBC does not challenge Article 52 insofar as it requires a property owner to allow a competitive provider access, nor could it, given the history of mandatory access laws, the Commission's deference to such laws, and the Exclusivity Order banning exclusive service arrangements.[73] Therefore, the only question is whether the competitive provider must run duplicative wiring to its customer where the former provider's wiring to the same customer stays unused. Nothing in the Commission's rules requires duplicative wiring and the federal rules reflect a strong preference against that outcome.[74] Article 52, by requiring property owners to make available wiring to competitive providers that would otherwise lie fallow,[75] reduces a provider's build costs, avoids disrupting consumers due to the installation of duplicative home wiring, and deftly accommodates "property owners' resistance to the installation of multiple sets of home run wiring in their buildings."[76] Therefore, Article 52 does not undercut the Commission's reasoned judgment in creating its inside wiring rules, but furthers and enhances the Commission's efforts to promote consumer choice and competition consistent with the City's jurisdiction.

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[72] *Telecomms. Servs. Inside Wiring, Customer Premises Equip., et al.*, CS Docket 95-184, Further Notice of Proposed Rulemaking, 12 FCC Rcd 13592, 13604, para. 25 (1997).

[73] *See generally* Exclusivity Order.

[74] As discussed herein, the Commission has noted that property owners resist having two sets of wiring. *See supra* p. 18; 1997 Wiring Order, 13 FCC Rcd at 3678, para. 36. In fact, MBC has also noted in comments to the Commission that property owners are reluctant to allow "overbuilds," which suppresses competition. *See* 1996 MCB f/k/a ITCA Comments at 47, 50. MBC, however, is effectively requiring that competitive service providers undertake "overbuilding" in seeking to invalidate Article 52.

[75] Article 52 defines "existing wiring" as "cable home wiring" and "home run wiring," as those terms are defined in the Commission's rules. Article 52 § 5200 ("'Existing wiring' means both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively, except that those terms as used herein shall apply only to the home run wiring or cable home wiring owned by a property owner.").

[76] 1997 Wiring Order, 13 FCC Rcd at 3678-79, paras. 35-36.

ii. Exclusive Wiring Arrangements Run Counter to the Purposes of Federal Law and Do Not Warrant Commission Protection

Article 52's pro-competitive provisions seek to address the anticompetitive effects of exclusive wiring arrangements. Exclusive wiring arrangements contractually confer to a favored provider the sole right to use the property owner's wiring, even after a subscriber discontinues service from that provider. In effect, under these arrangements, legal ownership of the wiring infrastructure, which remains with property owner, is separated from control over the use of the wiring, over which the incumbent provider assumes exclusively on a contractual basis. A subset of these arrangements are "leasebacks," where an incumbent service provider deeds title in their wiring to the property owner in exchange for an exclusive use license from the property owner.[77] By putting formal title to inside wiring in the hands of the property owner, while giving incumbents perpetual control or exclusive use rights (whether exercised or not), these arrangements amount to an end run around the Commission's rules designed to facilitate competitive access to *provider-owned* wiring in the event of termination of the incumbent provider's service.[78]

Indeed, exclusive leaseback arrangements violate the Commission's inside wiring rules. If the incumbent provider transfers legal title to its home wiring to the property owner before a customer terminates service and then leases it back with an exclusivity provision that prevents competitive use, the inside wiring will be unavailable for use by competitors when the customer

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[77] *See* Susan Crawford, *Dear Landlord: Don't Rip Me Off When it Comes To Internet Access*, Backchannel (June 27, 2016), available at https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.5pqcb96dq (last visited May 15, 2017) (noting that Time Warner Cable "worked around" FCC rules "by deeding ownership to their inside wires to the building owner, and then getting an exclusive license back from the owner to use those wires") (Crawford).

[78] *See* Carl Kandutsch Law Office, *Exclusive Use of Inside Wiring Clauses in Cable ROE Agreements* (May 2, 2014), available at http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements (last visited May 15, 2017) ("[B]y specifying that the Internal Wiring belongs to the property owner, the agreement evades the FCC's Inside Wiring Rules insofar as those rules apply only to inside wiring that is owned by the incumbent cable operator."); *see also* 47 C.F.R. § 76.802.

is ready to change providers. The Commission forbade this scenario through Section 76.802(j) of its cable home wiring rules, which places on the provider a duty to "take reasonable steps within [its] control to ensure that an alternative service provider has access to the home wiring at the demarcation point" and to not "prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service."[79] An exclusive leaseback agreement designed to prevent competitive use of wiring when the customer is ready to change providers runs directly counter to these obligations.

Section 5201(a) of the Ordinance complements the Commission's rules and cuts through this barrier to entry by preventing a property owner from interfering with a provider's use of the property owner's existing wiring (subject to Section 5206), irrespective of the exclusive license granted to an incumbent provider.[80] By addressing the practice of exclusive wiring arrangements, Article 52 does not undercut the Commission's reasoned judgment in creating its inside wiring rules, but rather augments the Commission's measures, including Section 76.802(j), that promote consumer choice and competition.

iii. Article 52 is Consistent with the Federal Rules on Telecommunications Inside Wiring

MBC contends that Article 52 conflicts with federal policy because it *does not* contain provisions addressing competitive providers' ability to use existing telecommunications wiring. MBC's theory is apparently that San Francisco's failure to regulate in this area creates confusion so great that it frustrates implementation of federal wiring policies in the City. Not only is this theory wrong, the supposed problem is one that MBC could address through education of its members. Furthermore, as discussed above, Article 52 guarantees property

[79] 47 C.F.R. § 76.802(j).

[80] Article 52 § 5201(a). To the extent an incumbent has an exclusive wiring arrangement in place, commercial right-of-entry or access agreements for MDUs typically contain severability clauses that would allow other parts of the contract to survive even if the Ordinance renders the exclusive right to use wiring null and void. *See, e.g.*, Crawford, *supra* note 77.

owners complete information about a competitive entrant's proposed design and build, which should resolve the abstract confusion that MBC purports to fear.

Beyond these factual points, San Francisco's legislative decision not to address competitive access to telephone wires tracks—rather than conflicts with—the Commission's approach. In its 1997 Wiring Order, the Commission stated that "[m]aintaining different sets of rules [one for telephone, one for cable] will not cause confusion because it appears that telephone and cable services will continue to be delivered over separate inside wiring networks for the near future."[81] According to the Commission, at least as far as inside wiring, "telephony generally appears to continue to be delivered over twisted pair wiring and multichannel video programming generally appears to be delivered over coaxial cable. . . . If and when circumstances change, we will revisit this issue with the goal of creating a single set of inside wiring rules."[82] The Commission has not revisited the issue, and San Francisco, following the Commission's framework of two distinct sets of rules, decided to address only cable home and home run wiring in Article 52.[83] That parallel approach could not possibly give rise to a valid finding of federal preemption.

C. Article 52 Does Not Impose Mandatory Wire Sharing and the Commission's Refusal to Adopt a Federal Wire Sharing Rule Does Not Create a Federal Interest that Occupies the Field

MBC contends that Article 52 imposes a form of "mandatory wire sharing" that, because it is not already required by the Commission, may not be established by any state or locality.[84] Again, MBC is both factually and legally incorrect.

[81] 1997 Wiring Order, 13 FCC Rcd at 3662, para. 2.

[82] *Id*. at 3728, para. 147.

[83] *See* Article 52 § 5200.

[84] Petition at 29.

First, MBC's repeated assertions that implementation of Article 52 involves sharing of wiring in an MDU even when "another provider is already using it"[85] are wrong. Typically, residents seeking competitive video and Internet service discontinue their existing bundled service, making the wiring for their home available for use by their new provider. Only one provider would use the wiring at a time.

To the extent end users keep receiving a service from an existing provider using landlord-owned wiring while taking service from a second provider, Section 5206(b)(5)(C) of the Ordinance protects the existing service.[86] That provision states that property owners can deny access to new entrants if the proposed installation of facilities and equipment would "have a significant, adverse effect on the continued ability of existing communications service providers to provide services at the property."[87] For example, if a resident wants to receive a new competitive video service, but retain Internet service using the cable wiring owned by the property owner, the property owner could deny the new provider access if installation of facilities to provide the competitive video service would disrupt the existing Internet service.[88] Thus, there is no "mandatory wire sharing" that could interfere with incumbent services against the property owner's wishes.[89]

Second, the fact the Commission has declined to adopt a federal wire sharing mandate does not establish a prohibition on mandatory wire sharing that occupies the field. Indeed,

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[85] *Id.* at 3.

[86] Article 52 § 5206(b)(5)(C).

[87] *Id.*

[88] The property owner has two opportunities to invoke his or her rights under Section 5206. *See supra* pp. 10-13.

[89] In addition to the other protections offered by Section 5206, Section 5206(b)(3) states that "physical limitations," which would include space restrictions, are reason enough to deny access upon a showing by the property owner. Article 52 § 5206(b)(3). The Commission should therefore reject MBC's repeated assertions that the Ordinance creates a free-for-all for any competitive providers to gain access to an MDU.

rather than adopting a rule against wiring sharing in 1997, the Commission left open the possibility of a wire sharing rule, noting that "the technical, practical and economic feasibility of multiple services sharing a single wire deserves further exploration."[90] When it revisited the question in its 2003 Wiring Order, the Commission again focused on technical feasibility, stating "that there are or may be significant unresolved technical problems" related to interference, and "declin[ing] to adopt DirecTV's line-sharing proposal *at this time.*"[91] In short, the Commission has never held that wire sharing pursuant to a state or local law or ordinance would contradict federal policy.

In any event, Article 52 is consistent with the Commission's own consideration of the issue. Rather than forcing wire sharing unconditionally, Article 52 establishes a test of technical feasibility: it requires access to the property owner's wiring only if (among other conditions) such use would not significantly and adversely impact an existing service.[92] Nothing in the City's approach conflicts with any Commission rule or decision.

Relatedly, MBC's assertion that Article 52 conflicts with the unbundled network element regime established in the Telecommunications Act of 1996 (1996 Act) cannot be taken seriously.[93] Article 52 does not address, mandate usage of, or "target" (as MBC alleges)[94] incumbent local exchange carriers' (ILEC) network infrastructure; rather, subject to Section 5206, the Ordinance allows competitive providers to use inside wiring *of the property owner* that may otherwise lie fallow. As the Commission has made clear, telephone inside wiring is the

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[90] 1997 Wiring Order, 13 FCC Rcd at 3729, para. 148.

[91] *See* 2003 Wiring Order, 18 FCC Rcd at 1377, para. 88 (emphasis added).

[92] FBA is currently unaware of any widely available commercial technology that would allow sharing of wires without signal degradation.

[93] *See* Petition at 26; *see generally* 47 U.S.C. §§ 251-252.

[94] *See* Petition at 27.

property of the premises owner, not the ILEC, and therefore is not part of the ILECs' unbundled local loop offering under the 1996 Act.[95]

D. Article 52 Does Not Conflict with the Commission's Policy on Bulk Billing

MBC contends that Article 52 effectively "invalidates" lawful bulk billing arrangements by "denying the bulk billing service provider the exclusive right to use designated wiring necessary for the delivery of its services and forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck."[96] As MBC's own argument makes clear, Article 52 does not "invalidate" any bulk billing arrangement. Like mandatory access laws have done for many years across the country, Article 52 allows for new service offerings for MDU residents. As made clear in the Commission's Exclusivity Order outlawing exclusive service arrangements, service providers and property owners have no federally protected interest in preventing such competition.[97]

As the Commission explained in considering and ultimately permitting them, bulk billing arrangements by definition are distinct from exclusive service arrangements. Unlike exclusive arrangements, bulk billing arrangements do not protect incumbent providers against competition

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[95] *See* 47 C.F.R. § 51.319(a) (defining the "local loop network element" as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."); *see also Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, WT Docket No. 99-217, *et al.*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23003, para. 44 (2000) (stating that the Commission's "new rules established a 'demarcation point' that marks the end of wiring under control of the LEC and the beginning of wiring under the control of the property owner or subscriber. Thus, the new rules permitted telecommunications subscribers and premises owners to assume or assign responsibility for installation and maintenance of inside wiring, which previously had been managed solely by the LECs under tariff.").

[96] Petition at 23.

[97] *See* Exclusivity Order, 22 FCC Rcd at 20249-50, para. 28 (explaining that agreements between incumbent MVPDs and MDU owners providing for marketing exclusivity or bulk discounts could provide benefits without causing "entry-foreclosing harms to consumers"). The Commission noted that "bulk billing arrangements may be exclusive contracts because MDU owners agree to these arrangements with only one MVPD, barring others from a similar arrangement." *Id.* at 20265, para. 65. Unlike exclusivity clauses that were banned, however, such "arrangements may not prohibit MDU residents from selecting a competitive video provider." *Id.* Were bulk billing arrangements found at the time to have caused the same harms as exclusivity clauses, they would have experienced the same fate.

within MDUs. Permitted bulk billing arrangements "do not hinder significantly, much less prevent, a second video service provider from serving residents in the MDU."[98] Rather, bulk billing arrangements require service providers to "offer service to every resident of the MDU, and the MDU owner to pay for service to all residents," regardless of whether a resident chooses to take the bulk service.[99] Thus, even with a competitive service at the MDU, the bulk arrangement between the property owner and bulk service provider remains intact, the residents receiving competitive service under Article 52 would have to pay for both the bulk-billed service and the competitive service,[100] and property owners would still be free to enter into such arrangements.

As the Commission observed, bulk billing arrangements may deter competitive service providers "from providing service . . . because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPDs' services, albeit one at a discounted rate."[101] Commission policy tolerates this negative economic consequence of bulk billing. But Commission policy does not support MBC's claim that wringing maximum profit from bulk billing arrangements provides a sufficient basis for altogether preventing competition.

V. CONCLUSION

The Commission should reject MBC's arguments that Article 52 is preempted by federal law and policy. The MDU residents of San Francisco deserve the benefits of competition and choice, and San Francisco has the authority to regulate property owners and the landlord-tenant relationship through Article 52 to achieve those ends. Article 52, rather than conflicting with the

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[98] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate*, MB Docket No. 07-51, Second Order and Report, 25 FCC Rcd 2460, 2461, para. 2 (2010).

[99] *Id.* at 2462, para. 6.

[100] *Id.* at 2461, para. 2.

[101] *Id*.

Commission's rules and policies, enhances them and advances competition and consumer choice. Accordingly, the Commission should deny the Petition.

Respectfully Submitted,

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